

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

YOWIE NORTH AMERICA, INC.  
and HENRY M. WHETSTONE, JR.,

Plaintiffs,

v.

CANDY TREASURE, LLC and  
KEVIN GASS,

Defendants.

Case No. 13CV1906-BEN(JMA)

**ORDER REQUIRING VIDEO  
TAPED DEPOSITION OF  
PLAINTIFF'S F.R.C.P. 30(b)(6)  
WITNESS**

A discovery dispute exists arising from Defendants Candy Treasure, LLC's and Kevin Gass's ("Defendants") Fed. R. Civ. P. 30(b)(6) Notice of Deposition of Plaintiff Yowie North America, Inc. ("Yowie"). Defendants seek to depose a representative of Yowie about Yowie's sales and claims of irreparable injury in the United States in order to oppose Yowie's pending Motion for Preliminary Injunction, which is scheduled to be heard on November 25, 2013. Defendant's opposition to the motion is due November 12, 2013. Given the exigency of the need for the discovery sought, the Court has permitted the parties to forego the undersigned's requirements for the handling of discovery disputes and instead permitted briefing in letter form. The parties' letter briefs were submitted on November 1, 2013 and have been reviewed by the undersigned.

1 The sole issue in dispute is whether Yowie's corporate designee, who  
2 is located in Australia, should be ordered to travel to San Diego for the  
3 deposition. Yowie has agreed to make this individual available by video  
4 conference for deposition. Defendants contend the deponent should be  
5 compelled to travel to San Diego, because Australia is a signatory to the  
6 Hague Convention and requires a party to obtain governmental permission  
7 to take a deposition on Australian soil. Defendants' Letter Brief, p. 2, *citing*  
8 *to 7 Foreign Affairs Manual 920* (available at  
9 <http://www.state.gov/documents/organization/86740.pdf>).

10 Defendants state governmental permission can not be obtained in sufficient  
11 time to timely oppose Yowie's motion. *Id.*

12 As explained in *Schindler Elevator Corp. v. Otis Elevator Co.*, 657  
13 F.Supp. 2d 525 (D.N.J. 2009) "(t)he Hague Convention 'prescribes certain  
14 procedures by which a judicial authority in one contracting nation may  
15 request evidence located in another nation.' *In re Automotive Refinishing*  
16 *Paint Antitrust Litig.*, 358 F.3d 288, 299 (3d Cir. 2004). The Convention is  
17 not mandatory and serves only as a permissive supplement to the Federal  
18 Rules of Civil Procedure. See *Societe Nationale Industrielle Aerospatiale v.*  
19 *U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 536, 107 S. Ct.  
20 2542, 96 L. Ed. 2d 461 (1987). When discovery is sought from a foreign  
21 party, there is no rule of 'first resort,' compelling the discovering party to  
22 attempt to utilize the Convention's procedures before resorting to the  
23 Federal Rules. See *Automotive Refinishing*, 358 F.3d at 300. As such, the  
24 Federal Rules remain the 'normal method[] for federal litigation involving  
25 foreign national parties' unless the facts of a given case indicate 'the  
26 'optional' or 'supplemental' Convention procedures prove to be conducive  
27 to discovery.' *Id.* at 300 (*quoting Societe Nationale*, 482 U.S. at 536)  
28 (emphasis added). .... In order to compel application of the Hague

1 Convention over the Federal Rules, the party seeking to apply the  
2 Convention procedures bears the burden to show that the "particular facts,  
3 sovereign interests, and likelihood [of resorting to Hague procedures] will  
4 prove effective." *Id.* at 300, 305. In evaluating whether to require resort to  
5 the Convention, courts should be mindful of 'unnecessary, or unduly  
6 burdensome, discovery' that may place foreign litigants in a  
7 disadvantageous position. *Id.*" *Schindler Elevator Corp.*, 657 F.Supp. 2d  
8 528-529.

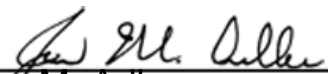
9 Unlike *Schindler Elevator Corp.*, this is not a situation in which a  
10 foreign party seeks to invoke the protections of the Hague Convention.  
11 Rather, Defendants argue the procedural requirements of the Hague  
12 Convention are so cumbersome, Yowie's representative should be ordered  
13 to travel to San Diego. Although Defendants state they "are not aware of  
14 any lawful way to bypass this Hague Convention requirement," they  
15 overlook that the Hague Convention is not mandatory and is only a  
16 permissive supplement to the Federal Rules of Civil Procedure. Defendants  
17 argue footnote 7 of *Societe Nationale* stands for the proposition that  
18 depositions of foreign nationals are different than document discovery and,  
19 therefore, require compliance with the Hague Convention. This argument,  
20 however, was expressly rejected in *Schindler Elevator Corp.*, which  
21 curiously is a case that was brought to the Court's attention by Defendants.  
22 As observed in *Schindler Elevator Corp.*, "numerous courts -- both before  
23 and after *Societe Nationale*" -- have determined the analysis regarding  
24 written discovery as opposed to deposition discovery is the same and have  
25 ordered depositions of foreign parties occur in accordance with the Federal  
26 Rules. *Id.* at 529 (*citations omitted*).

27 Fed. R. Civ. P. 29(a) allows parties to stipulate to a party deposition  
28 taking place "at any time or place" without resorting to the Hague

1 Convention. Furthermore, courts have routinely ordered depositions of  
2 individuals located in Australia be conducted by video conference, pursuant  
3 to the Federal Rules of Civil Procedure and without the need for the Hague  
4 Convention. *U.S. v. Philip Morris*, 2004 U.S. Dist. LEXIS 24551 (D.D.C.  
5 August 30, 2004) (video deposition ordered from Australia; *UniSuper Ltd. v.*  
6 *News Corp.*, 2006 Del. Ch. LEXIS 31 (Del. Chanc. Feb. 9, 2006) (applying  
7 state rule modeled on the predecessor to Fed. R. Civ. P. 30(b)(4) (Fed. R.  
8 Civ. P. 30(b)(7)) to order video deposition from Australia); *see also Baraz v.*  
9 *U.S.*, 181 F.R.D. 449, 452-453 (C.D. Cal. 1998) (telephonic deposition of  
10 Plaintiff; applying *Societe Nationale*); *In re Global Power Equip.*, 418 B.R.  
11 883 at 41-43 (D. Del. 2009) (deposition in France ordered finding the  
12 Hague Convention is not mandatory even though France has a statute  
13 purporting to require Hague Convention compliance). Here, Yowie has  
14 agreed to make its representative available for deposition by video  
15 conference. There is no need, therefore, to utilize the Hague Convention to  
16 accomplish this deposition, as the Federal Rules of Civil Procedure  
17 sufficiently address this situation and will allow Defendants a full and fair  
18 opportunity to test Yowie's assertions of irreparable injury.

19 Based on the foregoing, the deposition of Yowie's Fed. R. Civ. P.  
20 30(b)(6) witness shall proceed with the deponent participating by video  
21 conference.

22 DATED: November 6, 2013

23   
24 Jan M. Adler  
25 U.S. Magistrate Judge  
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